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ABSTRACT

This booklet was prepared to provide information and guidance for principals and other administrators on their duties and powers as defined by recent court decisions, and to suggest acceptable approaches to reasonable exercise of authority by school officials. The first section provides a general description of the concept "due process" and its relationship to school law. Based on recent court decisions, the guidelines for adminstrative action provided in section two concern freedom of expression; personal appearance; behavior codes; student property; extracurricular activities; disciplines; student government; student press; petition rights; and drugs. The final section presents annotations of landmark court cases that have affected the balance between the authority of the building administrator and the civil liberties of students. (JH)

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The Reasonable Exercise of Authority

by
Robert L. Ackerly

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Foreword

EVEN in the most civilized of organized societies, disputes are bound to arise. When they do, if that society is to remain orderly, some agent or agency must be responsible for a just settlement of the disagreement. Our courts have been assigned that role in America's governmental structure.

It is incumbent on all school and collegiate administrators to have more than a passing knowledge of the constitutional and statutory framework in which these institutions operate. Recognizing that the courts adapt to changing conditions, it is imperative that these same administrators be kept up-to-date on pertinent decisions from all courts up to and including the U.S. Supreme Court. It is the purpose of this booklet to highlight cases involving both state and federal jurisdictions. These deal with students and the associated issues of behavior codes, appearance, freedom of expression, right of petition, and similarly sensitive areas in these increasingly turbulent times.

The major contributor to this document was Robert L. Ackerly, chief counsel for the National Association of Secondary School Principals, and we are indebted to him for clearly delineating the legal issues and principles. The Executive Secretary also gratefully acknowledges the assistance of staff associates, especially Charles Hilston and Benjamin Warfield.

Owen B. Kiernan
Executive Secretary

A The Concept of Due Process

In recent years, militant student protests have taken place in university settings throughout the world. The United States has experienced such disruption to the extent that national attention has been focused on the various ways students have expressed their dissent in colleges and universities all over the country. All student demonstrations of dissent—be they lengthy sit-ins, teach-ins, boycotts, walkouts, walk-ins, or full-scale riots—have concentrated attention on the prerogatives of students, especially their right to be heard. As a result of these active demands and through several large and extremely effective student organizations, students on the college and university level have begun to wield a significant political power.

Now manifestations of student unrest are widespread in senior high schools and to a lesser degree in junior high schools. It is not surprising that the symptoms of radical change have infected the secondary schools, for these younger students are fully aware of impressive protective gains made by school teachers and university professors through their large and influential professional organizations and lobbies, and they are equally aware of the influence college students have exercised through similar organizational activity.

Because the principal of a secondary school is a highly visible and influential figure in the administrative structure of the school, he characteristically finds himself at the point where the often conflicting wishes and ambitions of stu-

dents, teachers, and parents collide with overall school administration policy. It is the principal above all others who must undertake to make these divergent interests compatible so that the school can be what it is intended to be, a place where learning can take place. But the efforts of school officials to cope with real or anticipated disruptions have resulted in a considerable number of court cases, some settled and others pending, in which the authority of the school (in effect, the principal) to control student conduct is challenged. From these court proceedings are coming more explicit statements than were heretofore available regarding the constitutional limits of the school's powers over the student as an individual.

Recent court decisions have tended in the direction of restraining the school from exercising many of the forms of control over student conduct which it and the community formerly accepted as normal and proper. But whatever the reasons for these legal actions may be and whatever their outcomes are, the impact of court decisions relating to the control of student behavior is felt more immediately and heavily by the building principal than by anyone else in the administrative or teaching hierarchy.

We come, then, to the commanding reason for preparing this document—to provide principals and other administrators with information and guidance on their duties and powers as determined by constitutional and statutory interpretation in the hope that such information will help them stay out of the courts. More specifically, we propose to consider the basic and general legal principles of *due process* and to suggest acceptable approaches to the necessary and *reasonable exercise of authority* by school officials.

BECAUSE due process will be mentioned explicitly or implicitly in much that we shall have to say from here on, a few comments about it are in order.

It is due process that assures the preservation of private rights against government encroachment. So a principal, representing authority in the school, must be careful to ensure due process to dissidents just as he himself expects to be protected from arbitrary tactics on the part of the police or the law courts, representing authority in the larger society.

Every discussion of the limits of authority or the exercise of personal rights and privileges has inherent in it the problem of procedure: procedure in bringing the subject up for discussion; procedure in airing the views of the people involved, whether they prove to be similar or conflicting; and procedure in reaching a decision as to the action to be taken. The underlying concept, understood by almost every American, is one of fairness, a *fair* hearing, a *fair* trial, a *fair* judgment. Every citizen needs to know that the government is not permitted to be arbitrary or repressive, and that he will have a fair opportunity to have his side of a controversy openly considered. Hence, every citizen is guaranteed the constitutional protection of a fair trial. This is the minimum for due process of law. Due process may be defined as a course of legal proceedings in accordance with the rules and principles established for the enforcement and protection of individual rights.

The concept applies to any dispute between two parties. As a legal concept, enforceable in the courts, it derives its validity from the presence of a court of competent jurisdiction, which has a duty to see that the individual's rights are protected. This means that a man must have personal

knowledge of any charges against him that endanger his freedom, his status, or his property. He must have an opportunity to be heard and to controvert the evidence or the witnesses against him. He must also have an opportunity to show that the rules or laws being applied to him are demonstrably unreasonable, arbitrary, capricious, discriminatory, or too vague to be understood, and, therefore, unenforceable. These considerations are as necessary to administrative proceedings in schools as they are to more formal trials in courts of law, although they may be discussed and handled in an informal way in most administrative proceedings. Many decisions correct in substance have been overturned on appeal to higher authority simply on the ground that due process or fairness was not observed.

Before going on, we must emphasize that only statements of general principles are possible here, and those for the most part will be based on decisions of federal courts. The variations among the myriad of state and local laws and decisions of state courts are too extensive to be treated adequately here; detailed explanations of these widely varying statutory requirements must be sought in other sources. But an additional reason for relating the following analysis principally to the judicial opinion of federal courts is that it is mainly the U.S. Supreme Court that is making clear by its decisions the obligation school officials have to afford the protection of the Bill of Rights and of the Fourteenth Amendment to all with whom they deal, regardless of age. To quote the now famous Gault decision, "Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [1]

[1] In re Gault, 387, U.S. 1, 13 (1967).

We acknowledge that the facts and comments presented here are neither unique nor new, for the essence of this paper is a distillation of writings on the subject. But legal reports and commentaries are not always close at hand for the principal, and, further, he rarely is practiced in interpreting what he hears or reads about court actions or opinions.

In the light of these considerations, this digest may be useful and supportive. We hope it will be of assistance in helping to minimize disruptions of the educational process, in actually enhancing and rationalizing administrative control, and, in the event of judicial challenge, enabling the principal to demonstrate the reasonableness of his actions.

ALTHOUGH courts—particularly state courts—historically have been reluctant to interfere with the principal's control of students in secondary schools, they have interceded often enough to persuade us that we should not base our generalizations only on judicial decisions already rendered. In our increasingly permissive society, judicial reluctance to interfere with the principal's authority is lessening. The larger and more impersonal our schools become, the less often courts see the *in loco parentis* concept as a barrier to applying legal principles to the administration-student-faculty relationship. And since there is an irreversible trend in our society to subject the exercise of power and authority to legal norms, there is every reason to believe that the courts have only begun to apply the body of law to secondary school student demonstrations and related activities.

This leads us, then, to what we consider a first principle in administrative conduct: *the principal must recognize the difference between civil disobedience and acts of violence.* Civil disobedience, limited by definition to non-violent activity, is usually within the control of the administration. Acts of violence may call for outside assistance since principals and teachers are not expected to be police officers.

Freedom of speech and expression have been protected by the courts for secondary school students.[2] This right is not unrestricted (Justice Holmes provided the classic example: yelling "fire" in a crowded theatre), but the limitations must be based on reason and need. The courts have affirmed that disruptions of the school program cannot be permitted ("no interference with work" in the classroom and "no disorder"), yet school administrators know that school control without outside force is most important and that calling the police often makes matters worse.

The courts have said that giving prior notice of changes in rules of conduct and in penalties for infractions is some evidence of a school's sensitivity to individual freedom. But certainly, merely meeting such a "prior notice" criterion is not sufficient. School boards, central office administrators, and building principals can do much to minimize, or perhaps avert, confrontations with students and to stay out of court by ensuring student participation—to the maximum extent feasible—in the development of rules of conduct and of related disciplinary procedures. A substantial body of evidence is accumulating that proves not

[2] *Tinker v. Des Moines School District,* 393 U.S. 503 (1969).

only that such participation is feasible, but also that the products of such collaboration can be judged reasonable and effective by both adult and adolescent criteria.

B *Positions on Ten Issues*

We are now ready to recommend what we consider defensible positions or guides to action on ten issues that, sooner or later, may arise in every secondary school community. We believe, further, that these guides will be useful not only to principals but also to students as they participate in decision-making activities in their schools.

Freedom of Expression

The basic position is: *Freedom of expression cannot legally be restricted unless its exercise interferes with the orderly conduct of classes and school work.* Students may freely express their points of view provided they do not seek to coerce others to join in their mode of expression and provided also that they do not otherwise intrude upon the rights of others during school hours. There can be no restriction on the wearing of buttons or other insignia expressing a point of view, but the rights of those not sharing that opinion must be equally protected. Wearing

provocative buttons or distributing controversial literature during regular school hours cannot be permitted to disrupt the work of the school. The following principles should be observed:

1. Buttons and other insignia may be worn to express a point of view unless doing so results in a direct interference with the school program.[3]
2. Buttons or other insignia may not be worn or displayed if the message is intended to mock, ridicule, or otherwise deliberately demean or provoke others because of race, religion, national origin, or individual views.
3. No student may pass out buttons or other literature during regular school hours either in class or in the halls between classes.
4. Students distributing buttons or other literature before or after regular school hours will be responsible for removing litter which may result from their activities.
5. Failure to observe these rules can result in confiscation of the material, curtailment of the privilege, or, when necessary, disciplinary action, including suspension.

Free expression has always been carefully guarded by the courts. Restrictions on the wearing of buttons and arm bands and the distribution of literature have been upheld *only where the practice materially and substantially interfered with school discipline.* Requiring prior approval of a specific button or piece of literature is probably

[3] *Tinker v. Des Moines School District,* 393 U.S. 503 (1969).

impractical and, in all likelihood, would be ruled too restrictive. In severe cases, however, where a concerted effort is being made to harass the school administration, the right to wear buttons and distribute literature on school grounds may be suspended *in toto* if class routine and the orderly changing of classes is disrupted. This must be done on a case-by-case basis, and limitations can be imposed only to the extent necessary to maintain reasonably good order and discipline, prevent fights, or protect those who do not wish to join in wearing the button or other insignia or to receive the literature.

Personal Appearance

The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing. From this generalization, it follows that *there should be no restriction on a student's hair style or his manner of dressing unless these present a "clear and present" danger to the student's health and safety, cause an interference with work, or create classroom or school disorder.*

A reasonable regulation concerning dress, hair style, and cleanliness will stress that such regulation is vital not only to the individual student but also to those with whom he shares a classroom or locker. Students should not wear clothing or hair styles that can be hazardous to them in their school activities such as shop, lab work, physical education, and art. Grooming and dress which prevent the student from doing his best work because of blocked vision

or restricted movement should be discouraged as should be dress styles that create, or are likely to create, a disruption of classroom order. Articles of clothing that cause excessive maintenance problems—for example, cleats on boots, shoes that scratch floors, and trousers with metal rivets that scratch furniture—can be ruled unacceptable.

We strongly recommend that all actions relating to school dress codes be taken only after full participation in the decision-making process by students and other concerned parties.

Codes of Behavior

The authority of school officials to comprehensively prescribe and control conduct in the schools has been affirmed repeatedly by the courts. The rules, however, must be concerned with speech or actions which disrupt the work of the school or the rights of other students. Therefore, rules regulating behavior in the school should reflect the school authorities' obligation to respect the constitutional rights of students and to require a mature sense of responsibility on the part of students toward others and toward the school. It should be noted in this connection that many conflicts between school authorities and students have been the consequence of students' breaking school rules which, students allege, limit their freedom of expression.

Rules requiring quiet in the library and in study halls are held to be reasonable. With respect to smoking by students in school buildings, the courts have held that a no-smoking rule is reasonable and fair. This is not surprising since the hazards to health caused by smoking are

thoroughly documented by the Surgeon General of the United States, and the "clear and present" danger to the safety of the school building and its occupants if smoking is permitted is evident.

Other restrictions on student behavior may be justified if they are required to protect students, especially those whose individual rights are threatened because of some form of minority status—race, religion, individual beliefs, or other distinguishing characteristics.

To generalize, behavior controls should be flexible and take into account local conditions.

Student Property

The general rule is that a *student's locker and desk should not be opened for inspection except when approved by the principal because he has reasonable cause to believe that prohibited articles are stored therein. If inspection takes place the student should be present.* Although this appears to be an altogether reasonable position to take regarding either search or seizure of student property, we strongly recommend that principals and school boards give further serious study to this constitutional issue, with the help of counsel, before setting firm policies for their schools. (It is appropriate here to remind readers of the need for "prior notice" to the student body and faculty when a policy has been agreed on or has been amended by school authorities.)

The conditions under which the school can or must permit the police to search students' lockers are still not clearly spelled out, but it is expected that the U.S. Supreme Court

will soon rule on the question of whether or not school authorities have the right to permit the police to search a student's locker without a search warrant. Many lawyers believe that, should this right to search without a warrant be denied the police, it might be denied school authorities as well.

Many legal specialists, it is true, are of the opinion that the strictures in the Fourth Amendment against search and seizure probably are not applicable to a student's person or to his desk or locker. Nonetheless, we caution principals against any such searching except under extreme circumstances, unless permission to do so has been freely given by the student, the student is present, and other competent witnesses are at hand.

Where drugs or weapons are suspected, the police should be contacted and the search conducted in keeping with accepted police procedures and with the principal or a designated faculty member present. A complete report on such an incident should be prepared promptly, checked with witnesses and the student or students involved, and a copy filed with the superintendent of schools and the board of education.

Extracurricular Activities

In every American secondary school, students are encouraged to form clubs and other groups which will enrich and extend their educational experiences. *Most schools have formalized and published procedures governing the creation and operation of such organizations, but we recom-*

mend that these procedures be reviewed to make certain that they include regulations to the effect that:

1. Before it can be recognized as a school group and be given use of school time and facilities, the club must be approved, in accordance with established criteria, by the principal or some other designated school official.
2. Membership must be open to *all* students except where the purpose of the club requires qualifications (a French club, for instance).
3. The club must have a faculty sponsor or adviser selected and approved according to agreed-upon procedures, and club activities will not be permitted until a faculty sponsor has been selected.
4. Clearly improper purposes and activities are not permitted and if persisted in will be cause for withdrawing official approval of the group.
5. School groups, either continuing or *ad hoc*, are not permitted to use the school name in participating in public demonstrations or other activities outside the school unless prior permission has been granted by the designated school official.

Although a principal may rightly feel little concern over the activities of a science club or a glee club but worry a great deal about activities built around more controversial purposes or activities, he ought in all cases to apply the rule of clear and present danger before taking or permitting drastic action in consequence of a club's program. The interests of the group must be weighed against the good of the total student body and the community. Interference

with school discipline, if demonstrated or can reasonably be anticipated, is, of course, an acceptable reason for limiting an organization's activities. When it appears necessary to ban a previously approved organization for failure to abide by the terms under which it was approved or because its activities present a clear threat to health or safety of members of the school, the banning should be done, if at all, only after the group has had a full hearing on its right to continue to exist.

We have pointed out previously that our courts have ruled that there are innumerable forms for expressing oneself, and that basic to the democratic concept of government is the right to free speech. The right of students to choose to express their opinions, desires, or ideas collectively in and through their organizations and to disseminate their ideas is protected by the Constitution.

Discipline

We recommend again that rules governing in-school discipline be established only after full participation of students and other concerned parties. Rules should be published from time to time and subjected to review at least annually. Minor infractions of school rules should be handled informally by faculty members. Serious breaches of discipline leading to possible suspension or some other major penalty should be subject to a hearing, but suspension by the principal, pending the hearing, may be enforced where necessary.

Serious breaches of discipline or an accumulation of minor breaches must be handled with due process. Because

it is now well established that students enjoy the protection of the Fourteenth Amendment, a number of procedural matters must be considered. Rules governing hearings should be formulated by the faculty and the student government representatives and should be published.

A notice of the time and place of the hearing and of the exact nature of the charge must be given to the student a reasonable time in advance. The hearing might be held by a panel. For example, two students and two faculty members could be selected by lot, and a fifth member be appointed by the principal. Student panelists selected by the school administration are not usually respected by the student body. Selecting a panel by lot approaches the jury system and should obviate charges of discrimination. In all cases the accused must be allowed to be represented by someone of his own choosing. The hearing may be informal, though it need not be open; and the accused must be allowed to cross-examine witnesses and to present witnesses in his own behalf. The student's parents or guardian may attend. The panel should be instructed to make findings of fact and submit these together with its recommendations to the principal promptly after the close of the hearing. The principal and, subsequently, the board of education should be guided by the report and the practical recommendations of the panel. Also, if the accused believes he was not accorded a fair hearing, he must be allowed to appeal on this ground; any other plan of action may result in school authorities being brought into court.

The principal must, in the final analysis, exercise the authority and assume responsibility for the proper application of all rules. The rule of law, not the rule of per-

sonality, should be his guide. Tolerance of dissent and non-violent protest may avoid violence and serious disruption.

Student Government

"Student government" as a title is now out of favor among some educators, but it is a convenient phrase to use in the present context to indicate a student council, a student senate, or some other group selected to participate in the administration of a school.

The forms and functions of a student government will, of course, vary with local conditions, but *in all cases the scope of its powers, privileges, and responsibilities should be a matter of public record.* This will mean, among other things, a published charter or constitution. Such a charter or constitution ought to be the result of joint administration-faculty-student discussions, and should be a document which all groups (though not necessarily all individuals) find acceptable.

Eligibility rules for candidates and rules for conducting campaigns and elections should be published, widely announced, and uniformly enforced. The activities or programs of the student government *within the framework of its charter* should not be subject to veto by the principal or the faculty. Qualifications for candidates should be as broad as local circumstances will permit.

The widest possible participation in student government should be encouraged, and any real or anticipated disagreement with the administration should not hamper its activities. Yet, published rules should be observed, and the

student government should not be permitted to act outside the scope of its authority as defined in its charter or constitution.

Although it may be viewed as gratuitous advice, we do think it important to remind school adults who are personally involved in the activities of a student government or who are influenced by its actions of their obligation also to respect that charter and to resist the temptation to take arbitrary and unilateral action whenever displeased by some action of that student government.

The Student Press

School-sponsored publications should be free from policy restrictions outside of the normal rules for responsible journalism. These publications should be as free as other newspapers in the community to report the news and to editorialize.

Students who are not on the newspaper staff should also have access to its pages. Conditions governing such access should be established and be available in writing, and material submitted should be subject to evaluation by the editorial board and, if need be, a faculty review board. These same general principles apply to access to other school publications.

Non-school-sponsored papers and other publications, including an "underground press," should not be prohibited, assuming that they, too, observe the normal rules for responsible journalism. However, distribution may be restricted to before and after school hours, and restrictions may also be placed on distribution points.

The Right to Petition

Students should be allowed to present petitions to the administration at any time. However, it may be reasonable to limit the collecting of signatures on petitions to before and after school hours. No student should ever be subjected to disciplinary measures of any nature for signing a petition addressed to the administration—assuming that the petition is free of obscenities, libelous statements, personal attack, and is within the bounds of reasonable conduct.

The right to petition is guaranteed by the Constitution and must always be permitted. Students should be assured that there will be no recrimination or retribution of any kind for signing a petition.

Drugs

The possession or use of certain drugs is a serious violation of law and punishable by fine and/or imprisonment. A student is required to obey the same laws on school grounds as off. There is a distorted notion gaining widespread acceptance that a school or college is a sanctuary. These institutions are a part of society and are subject to the same laws as the rest of society. Accordingly, the school authorities have the same responsibility as every other citizen to report violations of law. *Students possessing or using on school premises drugs prohibited by law should be reported promptly to the appropriate law enforcement officials.* School discipline should be imposed independent of court action. Students may, as determined

by local ordinance or school board ruling, be subject to immediate suspension or expulsion for possession or use of illegal drugs, but the suspension or expulsion must allow for hearing and review in the same manner as suspension or expulsion for any other reason.

The police power of the state cannot be diminished or compromised by school officials for a student. The principal must, of course, use discretion and judgment in a situation which may involve a violation of federal, state, or local law. Where such activity is suspected, we advise that the student not be interviewed or questioned in any manner. Rather, the principal should communicate all available information promptly to the police and offer full cooperation of the administration and faculty to a police investigation.

Whenever a principal has reason to know or suspect that a student is engaged in criminal actions—for example, a violation of the drug control laws—he would be well advised to protect both himself and the school by taking action with deliberate caution: not the caution of refusing to act, but the care of having a reliable witness to each step he takes, keeping an accurate record of what he says and does, and reporting every action to those who have a right to know, such as the superintendent and the school board, colleagues in the school, and especially parents. Violations of law should always be reported to the community's law enforcement agents; if the district has no regulation requiring principals to do so, it would be sensible to get one adopted.

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C Landmark Cases Annotated

Thus far we have discussed the new emphasis in secondary education on freedom of speech, freedom of expression, freedom of association, and due process of law, especially as they affect the authority and prerogatives of the building administrator. As we indicated earlier, our statements and advice are based upon what the courts are saying through the decisions which they render almost daily.

Because knowledge of court decisions is particularly important to principals as they continue to struggle with the many social and educational problems confronting the young American citizens they serve, it will be helpful to cite some actual cases which are particularly important or of a "landmark" nature. We conclude this discussion of the reasonable exercise of authority, therefore, by presenting annotations on a few such court cases.

Perhaps the turning point in the jurisprudence relating to the student's status in the secondary school is the decision of the United States Supreme Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). A student who refused to participate in saluting the flag and reciting the Pledge of Allegiance was expelled from school. The Court concluded that a rule compelling salute to the flag and recitation of the Pledge transcends constitu-

tional limitations on the power of local authorities, and is precluded by the First Amendment to the Constitution. In reaching this decision, the Court struggled with and finally overruled its decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Court approved a state regulation requiring that pupils in public schools on pain of expulsion participate in a daily ceremony of saluting the flag and reciting the Pledge of Allegiance to it. Two Justices who voted with the majority in *Gobitis* reversed their position in *Barnette*, and explained their change:

> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men. (319 U.S. at 644)

The classic statement, which is still frequently quoted by the courts as the basis for judging student-school relations, appears on page 637 of the *Barnette* decision:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Board of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at

> its source and teach youth to discount important principles of our government as mere platitudes.
>
> Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. (319 U.S. at 637-8)

The law, as developed by court decisions, rarely moves in a straight line. Early decisions tended to affirm broad control of students in the school authorities. Expulsion of an 18-year-old girl who insisted on wearing talcum powder on her face was upheld in *Pugsley v. Sellmeyer,* 158 Ark. 247, 250 S.W. 538 (1923), where the school had adopted a rule forbidding students to wear clothing tending toward immodesty or to use face paint or cosmetics. A Massachusetts pupil was expelled because of head lice and this action was found to be within the powers of the school authorities in *Carr v. Dighton,* 229 Mass. 304, 118 N.E. 525 (1918). Exclusion of a student who insisted upon wearing metal heel plates on his shoes in violation of a regulation was approved in *Stromberg v. French,* 60 N. Dak. 750, 236 N.W. 477 (1931).

Subsequent to the *Barnette* decision, court decisions have more carefully considered the application of constitutional rights to students and have examined cases more carefully in these terms. The results, of course, have not been consistent. A school regulation forbidding extreme haircuts was held to be valid and within the school board's jurisdiction in *Leonard v. School Committee in Attleboro,* 349 Mass. 704, 212 N.E.2d 468 (1965), though the court did

not discuss the application of the First Amendment nor make any reference to the Barnette decision in the Supreme Court.*

Similarly, a federal court in New Orleans upheld a school regulation which required hair to be clean and neat, and proscribed exceptionally long shaggy hair and/or exaggerated sideburns. [*Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967)] A California case held, to the contrary, that hair styles are a form of self-expression and protected under the First Amendment. The court explained the basis for its ruling.

> The limits within which regulations can be made by the school are that there be some reasonable connection to school matters, deportment, discipline, etc., or to the health and safety of the students. . . . The Court has too high a regard for the school system . . . to think that they are aiming at uniformity or blind conformity as a means of achieving their stated goal in educating for responsible citizenship. . . . [If there are to be some regulations, they] *must reasonably pertain to the health and safety of the students or to the orderly conduct of school business.* [Emphasis supplied.] In this regard, consideration should be given to what is really health and safety . . . and what is merely personal preference. Certainly, the school would be the first to concede that in a society

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* Judge Wyzanski of the United States District Court in Boston in an as yet unpublished decision rendered on September 23, 1969, directed the immediate reinstatement of a Marlborough, Massachusetts, High School student suspended for wearing his hair over his ears. (*Richards v. Thurston*, U.S. District Court for the District of Massachusetts, C.A. No. 69-993-W) For a further discussion of the issue of extreme haircuts see, "A Legal Memorandum Concerning the Regulation of Student Hair Styles," NASSP, Nov. 1, 1969.

> as advanced as that in which we live there is room for many personal preferences and great care should be exercised insuring that what are mere personal preferences of one are not forced upon another for mere convenience since absolute uniformity among our citizens should be our last desire. [*Myers v. Arcata Union High School District* (Super. Ct. Cal. 1966)]

In March 1966, the New York State Commissioner of Education ruled that a school board could not forbid a girl student to wear slacks to school where the garments were not indecent or untidy. A student editor was denied readmission to a state university in Alabama because he published, as editor-in-chief of the school newspaper, an editorial supporting the president of the university who was under attack by members of the legislature. The federal court directed the university to admit him to residence in the school on the ground that his writings were protected under the First Amendment to the Constitution. [*Dickey v. Alabama State Board of Education* 273 F. Supp. 613 (M.D. Ala. 1967)]

Two cases decided on the same day by the United States Court of Appeals for the Fifth Circuit permit an analysis of the guidelines for rules governing conduct of students in secondary schools. In *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) the court held that wearing buttons which contain the words "One Man One Vote" and "SNCC" and which did not appear to hamper the school from carrying out its regularly scheduled activities was protected as a right of free expression under the First Amendment.

In the second case, *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), the same court

found that a principal's decision to forbid the wearing of buttons which depicted a black and white hand joined together and the word "SNCC" was reasonable because the wearing of the buttons created an unusual degree of commotion, boisterous conduct, and undermining of school authority. Thus, a rule prohibiting the wearing of buttons may not be enforced unless the wearing of the button interferes with the maintenance of order and discipline within the school. Some of the court's reasoning in the *Blackwell* case may be instructive:

> It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. *This is not only proper in our opinion but is necessary.* [Emphasis supplied.]
>
> Cases of this nature, which involve regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment, present serious constitutional questions. A valuable constitutional right is involved and decisions must be made on a case by case basis, keeping in mind always the fundamental constitutional rights of those being affected. Courts are required to "weigh the circumstances" and "appraise the substantiality of the reasons advanced" which are asserted to have given rise to the regulations in the first instance. Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The constitutional guarantee of freedom of speech "does not confer an absolute right to speak" and the law recognizes that there can be an abuse of such freedom. The Constitution does not confer "unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom." Whitney v. People of State of California, 274 U.S.

> 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). The interests which the regulation seeks to protect must be fundamental and substantial if there is to be a restriction of speech. In Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), the Supreme Court approved the following statement of the rule by Chief Judge Learned Hand:
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> > "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."
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> In West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), involving a school board regulation requiring a "salute to the flag" and a pledge of allegiance, the Court was careful to note that the refusal of the students to participate in the ceremony did not interfere with or deny rights of others to do so and the behavior involved was "peaceable and orderly." (363 F.2nd at 753-4)

The most recent pronouncement of the Supreme Court attempts to describe the principle that will be applied by the courts in evaluating the reasonableness of school regulations relating to the conduct and decorum of the students. In *Tinker v. Des Moines Independent Community School Districts*, 393 U.S. 503 (1969), three pupils in the public schools in Des Moines, Iowa, wore black armbands to school to protest the government's policy in Viet Nam. The principals of the Des Moines schools met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. The District Court followed the *Blackwell* decision rather than the *Burnside* decision, and upheld the validity of the principals' policy.

The Eighth Circuit Court of Appeals divided equally, thus leaving the District Court's decision affirmed. The Supreme Court, in an opinion by Justice Fortas, laid down several principles which will undoubtedly be followed carefully by District Courts in the future. Justice Fortas made six points summarized here.

1. The wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to free speech, which is entitled to comprehensive protection under the First Amendment.
2. While the Court has repeatedly affirmed the need for comprehensive authority of the states and of school officials to prescribe and control conduct in the schools, the problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.
3. This case does not concern speech or action that intrudes upon or disrupts the work of the schools or the rights of other students. There were no threats or acts of violence on the school premises, although outside the classrooms a few students made hostile remarks to the children wearing armbands.
4. Any departure from absolute regimentation in school may cause trouble, but undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any deviation from the majority's opinion may inspire fear or cause a disturbance, but our Constitution says we must take this risk.
5. To justify prohibition of a particular expression of opinion in the schools there must be something more than a mere desire to avoid the discomfort and un-

pleasantness that accompanies an unpopular viewpoint. Where there is no finding or showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.

6. The school authorities in Des Moines did not purport to prohibit the wearing of all symbols of political or controversial significance but limited their policies to the wearing of black armbands to exhibit opposition to our country's involvement in Viet Nam.

Justice Fortas thus recognized that while school officials must have broad discretion in establishing and maintaining order and discipline, school officials do not possess absolute authority over students. He repeatedly stated that a student's freedom of speech can be curbed only when the student's conduct materially and substantially interferes with the maintenance of appropriate discipline. Conduct by students which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech. He theorized that a regulation forbidding any discussion of the Viet Nam conflict would violate the constitutional rights of students, but qualified this by pointing out that this presumption could be rebutted only by a showing that the students' activities would materially or substantially disrupt the work and discipline of the school. Since in the *Tinker* case no disturbances or disorders occurred, and since there were no facts to indicate a reasonable apprehension of disruption of school activities, the Constitution does not permit denial of this type of student expression.

A case-by-case application of these principles will be an extremely difficult, time-consuming, and awkward path to follow. This statement of student rights and responsibilities is intended to assist principals in the evaluation of the guidelines available from more recent court decisions. To some extent, it includes principles which have not been ruled on precisely by the courts, but there should be no need for repeated litigation in the development of administration-principal-student relationships.

About the Author

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